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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

**IN RE CAPACITORS ANTITRUST  
LITIGATION**

Case No. 3:14-cv-03264-JD

**DEFENDANTS NIPPON CHEMI-CON'S  
AND UNITED CHEMI-CON'S  
RESPONSE TO DPPS' MOTION TO  
STRIKE TESTIMONY OF DR. LAILA  
HAIDER**

Master Docket No.: 3:17-md-2801-JD

Hon. James Donato

Case No.: 3:14-cv-3264-JD

1 Direct Purchaser Plaintiffs’ (“DPPs”) motion to strike testimony given by Dr.  
 2 Laila Haider rests entirely on the mistaken premise that Dr. Haider presented the jury with an  
 3 “alternative” damages figure. *See* DPP Motion to Strike Testimony of Dr. Laila Haider (“DPP  
 4 Mot.”) at 1. But that is not what Dr. Haider did, either literally or by implication. Rather, both  
 5 the testimony in question and where it appeared in Dr. Haider’s examination clearly show that  
 6 the testimony was offered as another example of the nonsensical results produced by Dr.  
 7 McClave’s methodology, not as an endorsement of his model or any part of his methodology.  
 8 To the contrary, the entire purpose of Dr. Haider’s testimony was to show that Dr. McClave’s  
 9 model is biased and unreliable, not to adopt it or endorse it, even in part.  
 10

11 Nothing in either the specific question and answer cited by the DPPs or  
 12 Dr. Haider’s testimony as a whole mentions an “alternative damages calculation,” and nowhere  
 13 in her testimony does she provide an opinion that the \$66 million is a better or more reasonable  
 14 measure of damages than the one offered by Dr. McClave. The whole idea that Dr. Haider was  
 15 providing an “alternative damages” number is nonsensical, in that it is clear from the context—  
 16 and would be clear to the jury—that Dr. Haider was using the \$66 million to *criticize*  
 17 Dr. McClave’s model, not to *adopt* it. Nowhere does she suggest that the \$66 million represents  
 18 a better application of his model, or that the \$66 million can or should be used as an alternative.  
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21 The context in which the identified testimony was provided proves the point: The  
 22 Q&A that DPPs propose to strike came as part of a series of questions designed to highlight the  
 23 absurd results produced by Dr. McClave’s model.<sup>1</sup> Right before and right after the quoted  
 24  
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26 <sup>1</sup> While the DPPs now argue that the question clearly called for an opinion beyond the scope of  
 27 Dr. Haider’s report, they failed to object to the exchange until after the answer was given. “It is  
 28 a fundamental rule of evidence that an objection not timely made is waived.” *United States v.*  
*Jamerson*, 549 F.2d 1263, 1266–67 (9th Cir. 1977) (citing Fed. R. Evid. 103(a)(1)(A)). DPPs’  
 failure to object “after the question is propounded and before it is answered” thus waived the  
 objection. *See, e.g.*, Mueller & Kirkpatrick, Federal Evidence § 1:7 (“Absent unusual

1 testimony, Dr. Haider testified about other ways Dr. McClave’s model produced nonsensical  
 2 results. *See* Trial Tr. 1374:2–1375:7 (immediately prior to the questioned passage, describing  
 3 Dr. Haider’s brick-by-brick analysis showing that Dr. McClave’s model would still show  
 4 negative overcharges and describing this as “a big red flag”); 1385:3–12 (immediately following  
 5 the questioned passage, describing test results showing that if one reduced the actual prices for  
 6 the middle four years of the alleged conspiracy, Dr. McClave’s model would actually show  
 7 higher overcharges, and that “this [test] result makes no sense”). And in the very same section of  
 8 her testimony, Dr. Haider testified that the results of her annual indicator test similarly proved  
 9 that Dr. McClave’s model was “poorly constructed” and “poorly built.” *Id.* at 1383:16–18.<sup>2</sup>

11 When laying the foundation for the annual indicator test results at issue here,  
 12 Dr. Haider explained quite clearly that she had performed an “F-test” to evaluate Dr. McClave’s  
 13 model. *Id.* at 1380:12. She did not say or imply that her calculation provided an alternative  
 14 damages model. Indeed, the very next question confirmed that the \$66 million was the result of  
 15 a test of Dr. McClave’s model, not an alternative to it. *Id.* at 1384:9 ([Mr. Finzi:] “Finally, did  
 16 you – so you’ve talked about *a couple tests* . . . .”) (emphasis added). Showing that the smallest  
 17 adjustment to Dr. McClave’s model—removing a single variable— reduced damages by nearly  
 18 85% percent was an entirely appropriate criticism of his model.  
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23 \_\_\_\_\_  
 24 circumstances, an objection to testimony should be made after the question is propounded and  
 25 before it is answered.”).

26 <sup>2</sup> While DPPs now claim the Court did not overrule their objection to this Q&A, *see* DPP Mot.  
 27 at 2–3, counsel previously acknowledged the opposite. *See* Trial Tr. 1392:19–1393:2 ([Mr.  
 28 Saveri:] “. . . For example, there was testimony about an alternative damage model, which is  
 nowhere in Dr. Haider's report. I understand that you overruled it, but there -- there was no  
 questions and answers there.”).

Finally, and contrary to what is stated in DPPs' brief, Dr. Haider's criticism of Dr. McClave's model and the results of the "F-Test" came directly from her report, and the precise \$66 million figure was a simple arithmetic calculation of test results that Dr. Haider previously disclosed. Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure "does not limit an expert's testimony simply to reading [her] report[.] The rule contemplates that the expert will supplement, elaborate upon, and explain [her] report in [her] oral testimony." *Muldrow ex rel. Estate of Muldrow v. Re-Direct, Inc.*, 493 F.3d 160, 167 (D.C. Cir. 2007). Under the Federal Rules, "the purpose of these expert reports is not to replicate every word that the expert might say on the stand. It is instead to convey the substance of the expert's opinion so that the opponent will be ready to rebut, to cross-examine, and to offer a competing expert if necessary."<sup>3</sup> *Gallegos v. Seeley*, 2021 WL 4295290, at \*5 (S.D. Cal. Sept. 21, 2021) (cleaned up).

Dr. Haider's Report critiques the results generated by Dr. McClave's model when "the estimated overcharge is allowed to vary over time for each dielectric (*i.e.*, the overcharge is made flexible over time)." Expert Report of Dr. Laila Haider ("Haider Report") ¶ 78.<sup>4</sup> Her report also disclosed the statistical method employed to reach that result—"an F-test of the

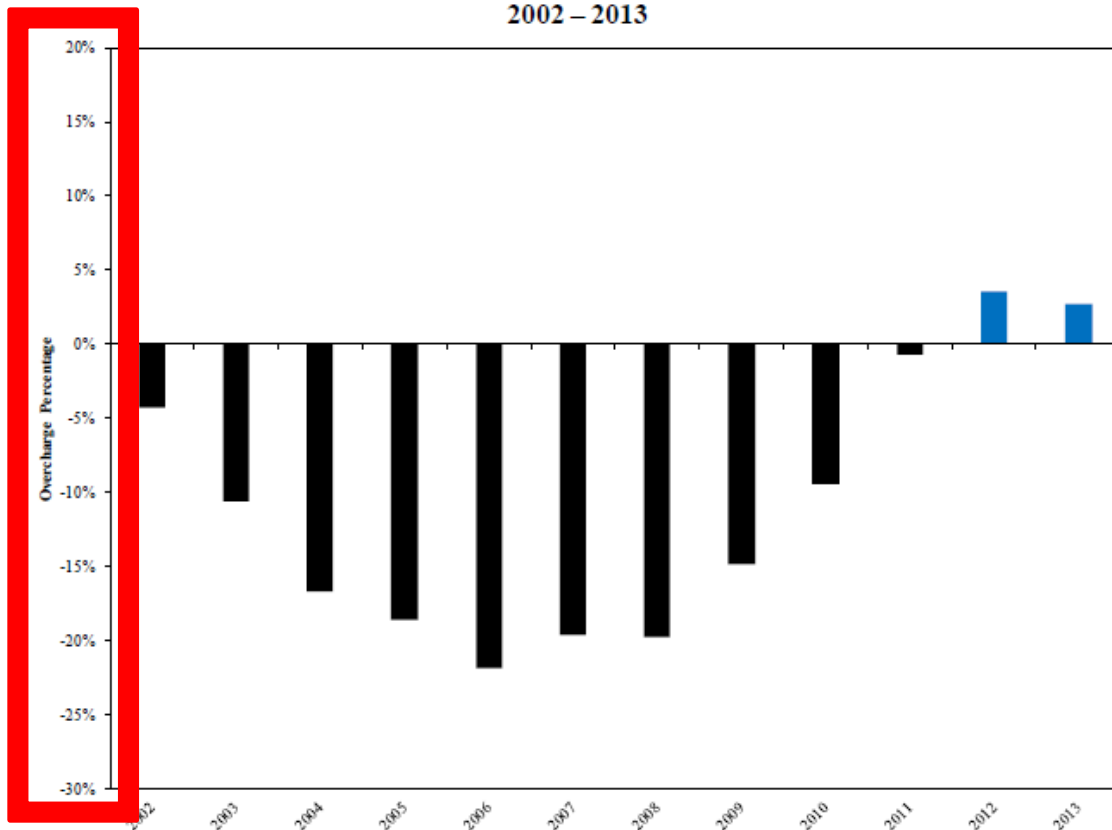
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<sup>3</sup> DPPs claim that they were "deprived . . . of an opportunity to address this critique during Dr. McClave's testimony." DPP Mot. at 3. But in fact DPPs addressed this precise point during both their direct and their re-direct of Dr. McClave, even calling Dr. Haider out by name. Trial Tr. 530:10–13 ("[Dr. McClave:] What some of the defense experts did was instead of that, they took that conspiracy test variable that I added at the bottom, and they said: We're going to chop that into 12 pieces, each one for an annual."); *id.* at 780:1–7 ("[Mr. Cramer:] Did Dr. Haider make that mistake in your opinion?"). Both Mr. Cramer and Dr. McClave made clear that they were preemptively addressing the very results that Dr. Haider later computed for the jury. *Id.* at 781:1–3 ("[Dr. McClave:] So is that a reliable way to estimate annual damages? It's not because . . ."); *id.* at 781:18–782:3 ("[Mr. Cramer:] And so Dr. Haider's model in this case . . . shows no damages? [Dr. McClave:] Well it's more nonsensical than that. It shows a discount. . . . Well, I might be able to understand zero damages if there were no conspiracy.").

<sup>4</sup> Excerpts from the Haider Report are attached as Exhibit 1 to the Declaration of Roberto Finzi, dated December 11, 2021.

hypothesis that the coefficients on yearly indicators for each year during the class period are equal”—and that that results were significant. *Id.* at ¶ 79, n.169. It disclosed the data underlying that methodology (Dr. McClave’s own data). *Id.* at 60–63 exs. 14, 15 & 16. And both Dr. Haider’s Report and the demonstrative vetted with DPPs before the testimony was offered included graphs showing the overcharge amounts by capacitor type and the years that those overcharge amounts would be applied to:

**EXHIBIT 14**  
**ESTIMATED OVERCHARGES FOR ALUMINUM CAPACITORS**  
**USING DR. MCCLAVE’S REGRESSION**  
**ALLOWING THE OVERCHARGE TO VARY BY YEAR**  
**2002 – 2013**



Source: Dr. McClave’s turnover.

Haider Report at 61 ex. 14 (for aluminum).

In sum, Dr. Haider’s trial testimony was based on a clearly-disclosed critique of Dr. McClave’s model. The results of that testing showed that Dr. McClave’s conclusions

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1 produced nonsensical results, and provided the jury with another example of how simple (and  
 2 minor) changes to Dr. McClave's model result in wild swings to his estimate of damages. *See*  
 3 *Speedtrack, Inc. v. Wal-Mart Stores, Inc.*, No. C 06-7336 PJH, 2012 WL 581338, at \*10–11  
 4 (N.D. Cal. Feb. 22, 2012), *aff'd sub nom. Speedtrack, Inc. v. Endeca Techs., Inc.*, 524 F. App'x  
 5 651 (Fed. Cir. 2013) (denying motion to strike a “new” opinion which merely added more detail  
 6 to the expert's prior expressed opinions).

### 7 CONCLUSION

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 9 For all of these reasons, DPPs' motion should be denied.

10 Dated: December 11, 2021

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13 By: /s/Roberto Finzi

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